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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 528

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York,

Appellant,

v.

MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et al.*

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR CERTAIN APPELLEES

DAVID FRIEDENBERG,
HOWARD EWART,
BENJAMIN GROSS,
JAMES MERCER DAVIS,
HOWARD ENGEL,
of Counsel with Appellees

Charles P. Anderson, Stephen R. Applegate, Hannah C. Bailey, Mrs. Maude A. Benkert, James Mercer Davis, Alfred R. M. Diggles, Howard Ewart, Herman Geismar, Paul S. Goble (M. D.), Emanuel Gross, William J. Gruler, Clair MacFarland, Hamilton G. Pedrick, Andrew Schwarz, Raymond C. Staples, Frank W. Sutton, Jr., Mrs. Mary A. Van Nostrand, Charles N. Warner, Zulena Cook Woodward, Arney-Sutton-Gruler Co., The Farg Co., Inc., Sutton Brothers Co. and Toms River Amusement Co.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 528.

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York, Appellant, *v.* MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et als.*	Appeal from the Court of Errors and Appeals of the State of New Jersey.

BRIEF FOR CERTAIN APPELLEES.

Statement.

This brief is filed in behalf of the following appellees: Charles P. Anderson, Stephen R. Applegate, Hannah C. Bailey, Mrs. Maude A. Benkert, James Mercer Davis, Alfred R. M. Diggles, Howard Ewart, Herman Geismar, Paul S. Goble (M. D.), Emanuel Gross, William J. Gruler, Clair MacFarland, Hamilton G. Pedrick, Andrew Schwarz, Raymond C. Staples, Frank W. Sutton, Jr., Mrs. Mary A. Van Nostrand, Charles N. Warner, Zulena Cook Woodward, Arney-Sutton-Gruler Co., The Farg Co., Inc., Sutton Brothers Co. and Toms River Amusement Co.

The statement of the case contained in appellant's brief and headed "Statement", "The Complaint" and

"Proceedings Below" requires no amplification or correction, except that the appellant failed to state, in mentioning the order for judgment entered in this cause in the New Jersey Supreme Court, that such order for judgment contained a recital that it appeared that no application was made by plaintiff to amend said complaint. The material portion of said order is as follows:

> "Ordered, that plaintiff's complaint be and the same hereby is struck out as to the above named defendants, and it appearing that no application is made by plaintiff to amend said complaint, it is further
>
> Ordered, that judgment final be entered in favor of each of said defendants and against said plaintiff, with costs to be taxed under the direction of this Court.
>
> Let this rule be entered.
>
> CHARLES W. PARKER,
> Supreme Court Justice."

(R., p. 22).

POINT I.

Section 94B of the New Jersey Corporation Act, and the judgment of the court below based thereon, do not violate the full faith and credit clause of the Constitution of the United States (Article IV, Section I).

The section of the Act in question reads as follows:

> "No action or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be

> deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties (P. L. 1897, p. 125)."

This section applies to the action presently before the court, as was held below by the New Jersey Court of Errors and Appeals, and in *Cochrane* v. *Morris,* 10 N. J. Misc. 82, 157 Atl. 652. It is argued in the appellant's brief that the New Jersey statute was not intended to apply to cases of this sort, but in view of the decision of the highest court of the State of New Jersey to the contrary, the question is no longer open.

This statute declares the public policy of the State of New Jersey. There is no similar provision for double liability of stockholders in banking corporations organized under the laws of that State, and, apparently realizing the harshness of the statutory remedy in other States, the New Jersey legislature has declared, in passing the above statute, that the only remedy afforded to enforce such statutory liability by the courts of New Jersey should be an equitable accounting action, in which the necessary parties shall be as enumerated therein. The statute, Section 94b, goes to the jurisdiction of the courts of New Jersey, which State retains the ancient distinction between the courts of law and of Chancery. See New Jersey Constitution, Article VI, Section I, which reads as follows:

> "1. JUDICIARY.—The judicial power shall be vested in a court of errors and appeals in the last resort

> in all causes, as heretofore; a court for the trial of impeachments; a court of chancery; a prerogative court; a supreme court; circuit courts, and such inferior courts as now exist and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish, as the public good shall require."

Thus the New Jersey Supreme Court below was incapable of entertaining the plaintiff's suit.

The Constitutional provision upon which the appellant relies reads as follows:

> "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The appellant's point is, that the State of New Jersey, in refusing to permit an action in the nature of the present one and requiring the enforcement of liability in the equity court, as specified in the section, denies to the constitution and banking laws of the State of New York the full faith and credit to which they are entitled under the Federal Constitution. Appellant also maintains that full faith and credit must be given under the Constitutional provision to the levy of the one hundred percent. (100%) assessment upon the stockholders of the Bank of United States by the appellant as Superintendent of Banks in New York. It is submitted that although the New York Constitution and Banking Laws are concededly "public acts" within the meaning of Article IV, Section 1, the conduct of the Superintendent of Banks is not entitled to full faith and credit by virtue of that section.

A—The assessment by the Superintendent of Banks of the State of New York is not conclusive under the law of that State.

The appellant, at great length, argues that, under the law of New York, in that State the determination of the Superintendent of Banks is conclusive in the absence of fraud, bad faith or clear error of law. It is respectfully submitted that the New York Court of Appeals has never so decided, and it cannot be said that the decisions of the lower courts in that State ever established a rule of law for New York according conclusive effect to the Superintendent's determinations. Although various New York opinions have referred to the derivation of the present banking law of that State (*i. e.*, Sections 80 and 120) from the National Banking Act (*Van Tuyl* v. *Scharmann*, 208 N. Y. 53; *Matter of Union Bank*, 176 N. Y. App. Div. 477, 163 N. Y. Supp. 485; *Broderick* v. *Aaron, et al.*, 151 N. Y. Misc. 516, 272 N. Y. Supp. 219), the statement that the determination of the Superintendent of Banks as to the necessity for and amount of the assessment, is conclusive in the absence of fraud, illegality and bad faith, has been made only in the *nisi prius* decision of *Broderick* v. *Adamson, et al.*, 148 N. Y. Misc. 353, 265 N. Y. Supp. 804. The language of that decision quoted on page 28 of appellant's brief is confessedly merely dictum. *Broderick* v. *American General Corporation*, 71 Fed. (2nd) 864, simply accepts Justice LYDON's dictum in the Adamson case, *supra*, and follows it.

On the other hand, Section 80 of the New York Banking law gives to the Superintendent's certificate the weight of "presumptive evidence" merely, and, as remarked in *Broderick* v. *McGuire, et al.*, 119 Conn. 83, 174 Atl. 314: "The construction (*i. e.*, conclusive effect) thus placed upon the provision in question goes far be-

yond any judicial interpretation of the words 'presumptive evidence' we have been able to find, *People* v. *Deluce*, 237 Ill. 541, 547, 86 N. E. 1080; *McGinty* v. *Brotherhood of Trainmen*, 166 Wisc. 83, 91, 164 N. W. 249; *State* v. *Simon*, 163 Minn. 317, 203 N. W. 989; *Fightmaster* v. *Mode*, 31 Ohio App. 273, 287, 167 N. E. 407; *State* v. *Intoxicating Liquors*, 80 Me. 57, 61, 12 A. 794."

The opinion in the McGuire case, *supra*, also reads:

> "Certainly the New York decisions in which the effect of the clause of the statute in question has been directly involved do not authoritatively construe it as making the certificate of the superintendent conclusive as to the necessity of the making of an assessment and as to its amount, but rather the contrary. Our conclusion is that the certificate of the superintendent of banks is made by the statute at most evidence of the necessity of the assessment and of its amount and that in an action to enforce an assessment made by him these questions present issues for the determination of the court."

B—The assessment upon the stockholders made by the Superintendent of Banks is not a "public act" within the meaning of the Constitutional provision.

The appellant's levy of the assessment is termed a "public act" at various places in appellant's brief. Although it is undoubtedly an *official* act of Mr. Broderick, it is not a *public* act within the full faith and credit clause of the Constitution. By the term "public acts," the Constitutional provision (Article IV, Section 1) obviously means only "statutes", *i. e.*, acts of the legislature. This is apparent from the law which Congress enacted on May 26th, 1790, pursuant to the power given it by Article IV, Section 1, to "prescribe by general laws the manner in which such acts, records and proceedings shall be proved, and the effect thereof." The said statute reads as follows:

> "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken". (Act, May 26, 1790, C. 11, 1 Stat. 122; R. S. Section 905, U. S. C. A. Title 28, Sec. 687).

Of course, the appellant does not sustain this misnomer of the assessment levy by any citation of authority. In *Crippin, Lawrence & Co.* v. *Laighton,* 69 N. H. 540, 44 Atl. 538, 641, 46 L. R. A. 467, Chief Justice BLODGETT of the New Hampshire Supreme Court, after quoting the full faith and credit clause and the act of Congress of 1790, said:

> "Nor, so far as we have been able to ascertain, is there a word to be found touching their meaning (*i. e.,* the term 'public acts'), or relating to the power of Congress to prescribe their effect, in any judgment of the United States Supreme Court. Presumably, however, the words 'public acts' mean 'public statutes', and the inference is strengthened by the first clause of the statute above cited."

The Constitutional clause, when it originated in the Committee of Detail of the Constitutional Convention, read:

> "Full faith and credit shall be given in each state to the acts of the legislature and to the records and judicial proceedings of the courts and magistrates

of every other state". (Story on Constitution, 2nd edition, vol. 2, p. 172).

And it is only reasonable to assume that the intention of the Convention was to mean "legislative acts" by the term "public acts." Concededly, the Constitution and Banking Laws of the State of New York upon which the appellant founds his alleged cause of action are "public acts" within the meaning of the Constitutional provision (*Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145 at 154 and 155).

C—The assessment upon the stockholders is not a judicial proceeding within the full faith and credit clause.

Nor is the administrative and *ex parte* determination by the plaintiff as to the necessity and amount of the assessment against the defendants and his subsequent levy of the assessment, although "quasi judicial," a "judicial proceeding" within the meaning of the Constitutional provision. The appellant concedes this, necessarily, under *Matter of Union Bank,* 176 N. Y. App. Div. 477, 163 N. Y. Supp. 485; *Isaac* v. *Marcus,* 258 N. Y. 257, 179 N. E. 487; *Bushnell* v. *Leland,* 164 U. S. 684; and *Ex Parte Chetwood,* 165 U. S. 443.

D—The National Banking assessment cases are not in point.

The array of Federal cases set out in the appellant's brief, such as *Kennedy* v. *Gibson,* 75 U. S. 476; *Casey* v. *Galli,* 94 U. S. 673; *Germania Bank* v. *Case,* 99 U. S. 628; *Studebaker* v. *Perry,* 184 U. S. 258; *Dewcese* v. *Smith,* 106 Fed. 438; affirmed *sub nom Smith* v. *Brown,* 187 U. S. 637 (see appellant's brief, pp. 21 to 24), holding that the determinations of the Comptroller of Currency in assessing stockholders under the National Bank-

ing Act are conclusive and not subject to collateral attack, has no bearing on the effect of the determinations of the New York Superintendent of Banks, since the New York statute differs from the act of Congress in question. The conclusive effect given by the Federal cases to the determination of the Comptroller of Currency depends upon the presumption of good faith and regularity attending the performance of official acts and not upon any particular provisions of the National Banking Act. But the Legislature of the State of New York has seen fit to alter this common-law rule as applied to its Superintendent of Banks by making his certificate merely "presumptive evidence" of the necessity for, and the amount of, the assessment.

Said cases are further irrelevant to the argument of this cause, in that the assessments under the ~~New York~~ National Banking Act were not considered under the full faith and credit clause. The Federal statutes, and the acts done thereunder by Federal officers, by virtue of the supremacy clause of the United States Constitution (Article VI, Sec. 2), become part of the municipal law of every state in the Union. Hence, the statement of the effect of the assessments by the Comptroller of Currency throughout the United States is no more cogent an argument that the assessment herein is entitled to full faith and credit in the State of New Jersey than the declaration in *Broderick* v. *Adamson*, 148 N. Y. Misc. 353, 265 N. Y. Supp. 804 at 822, of the effect in New York of the Bank Superintendent's decisions.

E—The full faith and credit clause does not require a State to provide a court and method of enforcement of judgments of sister States.

Under the constitutional provision and the Congressional Act of 1790, *supra*, this court has, on numerous occasions, held that when a judgment of one State is sued

upon in another State, it has the same effect in the latter State as it had in the State in which it was obtained. *McElmoyle* v. *Cohen*, 13 Peters 312; *Bigelow* v. *Old Dominion Copper Mining &c. Co.*, 225 U. S. 111; *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *Roche* v. *McDonald*, 275 U. S. 449. However, even as to the enforcement of judgments, there are definite limitations, and in many cases the sister State is not required by the Constitutional provisions and the statute to enforce the judgment of another State. Common examples are: Where the judgment is upon a penal statute (*Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265); where a decree of divorce has been rendered, purporting to dissolve a marriage the parties to which were domiciled in one State, for a cause arising in the State of the marital domicile, but not a cause for divorce in that State (*Andrews* v. *Andrews*, 188 U. S. 14); where the judgment was rendered by a court not having jurisdiction of the cause of action or of the parties (*Pennoyer* v. *Neff*, 95 U. S. 714). So, an action on the judgment of one State may be barred by the expiration of the statute of limitations of the State within which suit upon the judgment is brought. *Alabama State Bank* v. *Dalton*, 9 How. 522.

It has frequently been stated that the full faith and credit clause is not jurisdictional, but merely provides a rule of evidence. *McElmoyle* v. *Cohen*, 13 Peters, 312; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373; *Clifford* v. *Williams*, 131 Fed. 100; *Israel* v. *Israel*, 130 Fed. 237. In *Wisconsin* v. *Pelican Ins. Co.*, *supra*, at page 292, Mr. Justice GRAY said:

> "A judgment recovered in one State, as was said by Mr. Justice Wayne, delivering an earlier judgment of this court, 'does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must

be made a judgment there; and can only be executed in the latter as its laws may permit.' McElmoyle v. Cohen, 13 Pet. 312, 325 (10: 177, 183)."

And one very important and logical result of this statement is that a State need not provide a court within which, and a procedure by which, the judgment of a sister State may be sued upon.

In *Anglo-American Provision Co.* v. *Davis Provision Co., supra,* this court, per HOLMES, J., said:

"* * * The parties are both Illinois corporations, and the plaintiff in error brought suit in the New York Supreme Court upon an Illinois judgment. By the New York Code of Civil Procedure, section 1780, it is provided that 'an action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: * * * 3. Where the cause of action arose within the state, etc.' * * *.

"The State court decides that the cause of action did not arise within the state in the sense of the words of the Code, and, of course, we follow its construction, subject to the inquiry whether the statute as construed is consistent with the Constitution of the United States * * *.

"We are of opinion that the section of the Code as construed is not unconstitutional. The precise point has not been decided by this court, but it has been laid down in cases which raise greater difficulties than the present, that this provision of the constitution establishes a rule of evidence rather than of jurisdiction. Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 291, 32 L. Ed. 239, 243, 8 Sup. Ct. Rep. 1370; Andrews v. Andrews, 188 U. S. 14, 36, 47 L. Ed. 366, 371, 23 Sup. Ct. Rep. 237. The Constitution does not require the State of New York to give jurisdiction to the supreme court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the judgment is fixed by the Constitution and the act in pursuance of it which Congress has passed. Rev. Stat. section 905 (U. S. Comp. Stat. 1901, p. 677). But the Con-

stitution does not require the state to provide such a court * * *."

See also: *Weidman* v. *Weidman*, 174 N. E. 206 (Supreme Judicial Court of Mass., Jan. 8, 1931), especially at page 208.

The New Jersey statute in question (Sec. 94b of the New Jersey Corporation Act, plainly intends that the law courts of the State of New Jersey should not have jurisdiction over suits to enforce the statutory liability of stockholders of foreign corporations, and that the Court of Chancery of New Jersey should have sole jurisdiction to entertain such suits. The statute is thus in the same category as the section of the New York Code of Civil Procedure referred to in the Anglo-American Provision Co. case, *supra*.

It is respectfully submitted that, under the authority of the case of *Anglo-American Provision Co.* v. *Davis Provision Co., supra*, a State could constitutionally pass an act the effect of which would be that the State did not provide any means of enforcing a judgment of a sister State; and if it provided a certain remedy for enforcing such judgment, whether the same be a reasonable remedy or otherwise, it could not be compelled to afford a different procedure. So, conceding, for argumentative purposes only, the Superintendent's assessment to be a "judicial proceeding" within the meaning of the full faith and credit clause, still New Jersey might prohibit its enforcement by statute, and Section 94b, providing a certain form of remedy, instead of prohibiting any remedy, is constitutional.

The appellant relies upon the cases decided in this court involving proceedings to enforce assessments of stockholders of Minnesota corporations under liability provisions of Minnesota law, in which cases this court held that the refusal of courts of other states to allow recovery in said suits denied to the judicial proceedings

of the Minnesota courts (sequestration suits in which the necessity and amount of the assessments were determined and from which the plaintiffs derived their authority to bring suit) the full faith and credit to which said judicial proceedings were entitled under the constitutional clause and the Congressional Act of 1790, *supra*. These cases are: *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Aetna National Bank*, 212 U. S. 567; *Converse* v. *Hamilton*, 224 U. S. 243; *Selig* v. *Hamilton*, 234 U. S. 652; and *Marin* v. *Augedahl*, 247 U. S. 142.

In none of them was there involved a statute passed by the legislature of the forum in which the plaintiff chose to bring his suit to enforce the stockholder's liability to assessment, which deprived the courts of that State of jurisdiction to determine a suit of that nature. The only point made therein was that a court of one State, *having general jurisdiction*, could not on the ground of policy or in its discretion refuse to enforce the judgment or give effect to the judicial proceedings of a sister State. The distinction is made in the Anglo-American Provision Co. case, *supra*, by Mr. Justice HOLMES, who said, distinguishing the statute construed in another case from the one involved in the matter then before the court:

> "The statute made no discrimination in the right to come into court, according to the character of the plaintiff or of the cause of action, but attempted to create a defense against a plaintiff assumed to have a right to come into court and to invoke the jurisdiction. But when the plaintiff was in court, and exhibited his judgment, it was too late for the state to interfere. In the case at bar the plaintiff had no right to come into the New York Supreme Court."

F—The State of New Jersey is not required by the full faith and credit clause to enforce in its courts the cause of action created by the New York Constitution and banking laws in favor of the appellant, whether the liability of the shareholders thereunder be deemed contractual or otherwise.

These appellees do not contend that the liability sought to be enforced is penal, within the meaning of *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, and concede that similar liabilities have been declared by this court to have a contractual nature, although Mr. Justice HOLMES expresses doubt as to the nature of the contract in *Bernheimer* v. *Converse*, 206 U. S. 516, 535. But it cannot be disputed that liability is founded expressly upon the New York statute pleaded in the complaint below (R., p. 5, pars. 6 and 7, and p. 7, par. 10).

(1) *The decisions of this court involving the Minnesota laws were predicated upon the existence of judicial proceedings in that State.*

The appellant has seized upon the general similarity between the natures of the present action and of the actions in the line of cases involving the Minnesota laws, such as *Bernheimer* v. *Converse, supra,* and *Converse* v. *Hamilton, supra.* There is one very important point of difference, however, which is sufficient to show the inapplicability of the doctrine of *Converse* v. *Hamilton, supra,* to wit: In every case involving liability under the Minnesota laws, the plaintiff had sued upon a judicial decree or as the result of a judicial proceeding in the foreign State, Minnesota; whereas, in the case at bar, the appellant is suing upon a cause of action given to him solely by the Constitution and statutes of the State of New York. It may be true, as appellant argues, that the judicial proceedings in the Minnesota courts

were summary; but, nevertheless, the judicial orders or decrees made were those to which the courts of other States are required to give the same effect as they had by law or usage in the State of Minnesota (Act May 26, 1790, c. 11, 1 Stat. 122, R. S. Sec. 905, U. S. C. A. Title 28, Sec. 687). And it was that fact which was emphasized in the opinions of this court. *Vide: Selig* v. *Hamilton,* 234 U. S. 652, at 663. The argument appearing on page 69 of the appellant's brief, that the existence of judicial proceedings was not determinative of the Minnesota cases on the theory that the court orders involved therein would have been invalid in States other than Minnesota because of the absence of personal service in Minnesota of the stockholders affected, is without substance. That argument overlooks the well-known rule, frequently alluded to in the appellant's brief, that the courts of the domicile of a corporation have sufficient jurisdiction to determine the necessity for and amount of an assessment against stockholders, and that such judicial determinations insofar as they relate to such general affairs of the corporation are conclusive and binding upon its stockholders, even though the stockholders are beyond the reach of process, said stockholders being represented by the corporation and no personal judgment being found against them in such proceedings. *Bernheimer* v. *Converse,* 206 U. S. 516, 532; *Converse* v. *Hamilton,* 224 U. S. 243, 260; *Selig* v. *Hamilton,* 234 U. S. 652, 666; *Royal Arcanum* v. *Green,* 237 U. S. 531, 554; *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662, 671.

(2) *The public acts, i. e., statutes, of one State are not required by the full faith and credit clause to be given in every other State the same effect as they have in the State of their enactment.*

The full faith and credit clause is not self-executing. *McElmoyle* v. *Cohen,* 13 Peters, 312, especially page 325,

et seq.; Alabama State Bank v. *Dalton,* 9 How. 522; *Roller* v. *Murray,* 234 U. S. 738, 745. It required Congress to legislate as to the manner of proof and effect of the acts, records and proceedings which are entitled to full faith and credit thereunder. *Tilt* v. *Kelsey,* 207 U. S. 43. Accordingly, on May 26th, 1790, Congress passed the law which we have set out in full hereinabove. (Act, May 26, 1790, c. 11, 1 Stat. 122, R. S. Section 905, U. S. C. A. Title 28, Sec. 687.)

It is respectfully submitted that the distinction between the cases such as *Converse* v. *Hamilton, supra,* and the case at bar, is of vital importance and materiality for the reason that statutes and judicial records and proceedings of courts are afforded different treatment under the full faith and credit clause. The statute of 1790, *supra,* clearly shows this distinction, for the reason that said statute, with respect to *statutes,* merely provides a method of authentication thereof, whereas, with respect to *judicial records and proceedings,* it prescribes, in addition to a method of authentication, that said proceedings shall have the same effect in States where they are proved in evidence as they had in the State whose judicial proceedings and records they are.

In Justice STONE'S dissent in *Yarborough* v. *Yarborough,* 290 U. S. 202, at page 215, there is a note which reads as follows:

> "The constitutional provision giving Congress power to prescribe the effect to be given to acts, records and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts by the full faith and credit clause alone. It was remarked on the floor of the Constitutional Convention that without the extension of power in the legislature, the provision 'would amount to nothing more than what now takes place among all Independent Nations.' Hunt and Scott, Madison's

> Reports of the Debates in the Federal Convention of 1787, page 503. The play which has been afforded for the recognition of local public policy in cases where there is called in question only a statute of another state, as to the effect of which Congress has not legislated, compared with the more restricted scope for local policy where there is a judicial proceeding, as to which Congress has legislated, suggests the Congressional power."

The learned Justice appears to make the very point now contended for by these appellees. Therefore, whatever may be the compulsion upon the States to give effect to the judgments of sister States, there is no such compulsion to enforce a cause of action arising under the laws, or even by virtue of the laws, of a sister State.

The appellant relies upon the decisions of this court, in *Whitman* v. *National Bank of Oxford,* 176 U. S. 559, and *Hancock National Bank* v. *Farnum,* 176 U. S. 640, to demonstrate the unconstitutionality of Section 94b. It is, however, submitted that these two cases are distinguishable from the present one on the same ground as the decisions involving the Minnesota assessments are distinguishable; that is, judicial proceedings were involved in both of them. This court held in the above-cited cases that not to permit the enforcement of a suit brought by a creditor of a Kansas corporation who had in Kansas secured judgment against the corporation, would deny to the *Kansas judgment* that effect which it had in Kansas. It is clear that the Whitman and Farnum cases do not establish that all States must give effect to the *statutes* creating double liability by permitting recovery in their courts, the Kansas statutes being important only as showing what were the effects of such judgments in Kansas. This court in those cases carried out the Congressional enactment of 1790 (Act May 26, 1790, c. 11, 1 Stat. 122, R. S. Sec. 905, U. S. C. A., Title 28, Sec. 687) as to the effect to be given

to *judicial proceedings.* Thus, this court said in the Farnum case, *supra,* at page 643, f, after quoting R. S., Section 905:

> "Such is the congressional declaration of the effect to be given *to the records and judicial proceedings* of one state in the courts of every other state. In other words, the local effect must be recognized everywhere through the United States." (Italics ours.)

Nor have appellees contended, as mentioned on page 55 of the appellant's brief, that the judgment enforced in the Farnum case was one against the stockholder, but contended only that this court recognized the binding effect upon the stockholder of the judgment against the corporation on the theory of his privity with the corporation. *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662, 671.

Appellant also contends that *Royal Arcanum* v. *Green,* 237 U. S. 531, and *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544, establish the unconstitutionality of Section 94b. It is submitted that the cases are not in point for several reasons:

1st: This court was in both those cases swayed by considerations of the peculiar nature of the corporations involved therein, *viz.*: fraternal benefit societies, and in the Mixer case commented upon the "complex and abiding relation" in which each and every member enters when joining such a society. In the Green case, the indivisible unity between the members and the fraternal benefit society was discussed thoroughly and at length, and this fact was emphasized in the opinion in the later case by Mr. Justice HOLMES. It may be noted that State courts had frequently, before the Green and Mixer cases were decided, determined, without regard to the full faith and credit clause, that, because of the nature of such societies, all questions as to the rights and duties

of the members thereof were to be determined by the law of the domicilliary State. A number of such cases are cited by this court in the Green case, on page 543. A compelling reason for the decision in the Green and Mixer cases is that the funds of the benefit society constitute a trust fund in which all the members wherever located participate. The trust fund is created by the assessments, and, because the participation in the fund must be governed by one law, it is proper that the assessments upon the members for the building up of the fund be governed by the same law. The same line of reasoning is not applicable to a business corporation, like the Bank of the United States, and there is no reason why this court should extend the rule of the Green case to business corporations whose stock is freely bought and sold as was that of the Bank of the United States.

2nd: The decisions in the fraternal benefit society cases held only that, as a question of conflicts of law, the courts in which suits involving questions as to the rights and liabilities of the members of such societies are being adjudicated should apply the substantive law of the corporate domicile in determining those rights and liabilities. The decisions do not imply that remedies for the enforcement of such rights provided under the domicilliary laws must be applied in other jurisdictions. In other words, the contract is to be construed as it is construed in the State of the domicile, and other States are not permitted to change the terms of the contract.

3rd: In the Green case, a judgment in the domicilliary state of Massachusetts, in a suit to which the corporation had been a party, and, hence, the individual members had been parties by representation (*Selig* v. *Hamilton*, 234 U. S. 652), preceded the institution of the suit in New York, and, of course, the member could

not be heard to controvert the adjudication in that case which was pleaded in the answer to his action. It is interesting to observe that this court, in the subsequent case of *Hartford Life Ins. Co.* v. *Barber,* 245 U. S. 146, preferred to base its decision upon the binding effect of the prior judgment in the State of domicile, rather than upon the necessity of construing the insurance contract involved by the domicilliary law.

4th: In both the Mixer case and the Green case, the fraternal society was the defendant and not the plaintiff. In the earlier case, Green sued for a declaration that he was entitled to pay his assessments to the society at a former and lower rate. The defendant society pleaded that under the law of Massachusetts as interpreted by the judgment in Massachusetts, the increase of the assessment rate was valid. The action of the New York court in holding to the contrary was deemed unconstitutional. In the Mixer case suit was again instituted against the society, this time for a benefit, and the defendant pleaded a certain by-law whose validity had been upheld by the courts of the domicilliary State. This court held that the *defenses* were required to be sustained by the full faith and credit clause. In the case at bar, the appellant maintains that the New Jersey courts must permit him to enforce his assessment, but the reasoning of the Green and Mixer cases is not applicable to support the claim now made. For there is a distinction between a plaintiff asserting a foreign "public act" as the basis of his rights, and a defendant asserting the same as matter of defense. This point was explained in the case of *Bradford Elec. Light Co.* v. *Clapper,* 286 U. S. 145, wherein an action in tort was brought in New Hampshire by the widow of a deceased employee to recover damages for the death from his employer. The contract of employment was made in Vermont,

but the injury occurred in New Hampshire. Under the law of New Hampshire, a workman was not confined to his remedy under the Workman's Compensation Law, but might elect to bring a common law action. Under the law of Vermont, a workman was confined to his claim for compensation. The New Hampshire court refused to permit a plea, by the defendant employer, of the terms of the Vermont law and permitted a judgment to go for the plaintiff. The judgment was reversed in this court on the ground that the full faith and credit clause required the New Hampshire court to permit such plea. Mr. Justice BRANDEIS said; on page 160:

> "It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another State. There is room for some play of conflicting policies. Thus, a plaintiff suing in New Hampshire on a statutory cause of action arising in Vermont might be denied relief because the forum fails to provide a court with jurisdiction of the controversy (citing cases); or because it fails to provide procedure appropriate to its determination (citing cases); or because the enforcement of the right conferred would be obnoxious to the public policy of the forum (citing cases); or because the liability imposed is deemed a penal one (citing cases). But the Company is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another State. The right which it claims should be given effect is set up by way of a defense to an asserted liability; and to a defense different considerations apply (citing cases). *A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to*

irremediable liability. This may not be done. Compare Modern Woodmen v. *Mixer,* 267 U. S. 544, 550, 551, 69 L. ed. 783-785, 41 A. L. R. 1384, 45 S. Ct. 389; Aetna L. Ins. Co. v. Dunken, 266 U. S. 389, 69 L. ed. 342, 45 S. Ct. 129; Supreme Council, R. A. v. Green, 237 U. S. 531, 59 L. ed. 1089, L. R. A. 1916A, 771, 35 S. Ct. 724. See also Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 S. Ct. 955, 5 N. C. C. A. 1004; Atchison T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 69, 53 L. ed. 695, 701, 29 S. Ct. 397." (Italics ours.)

A further argument against the appellant's contention that the full faith and credit clause requires each State to give to statutes of a sister State the same effect that they are given in the sister State is found in the repeated decisions of this court that the construction or interpretation by the courts of one State of the Constitution or a statute of another State raises no Federal question under the full faith and credit clause. *Glenn* v. *Garth,* 147 U. S. 360; *Lloyd* v. *Matthews,* 155 U. S. 222; *Allen* v. *Allegheny Co.,* 196 U. S. 458; *Western Life Indemnity Co.* v. *Rupp,* 235 U. S. 261; *Louisville & Nashville R. R. Co.* v. *Melton,* 218 U. S. 36, 51.

POINT II.

Causes of action created by the laws of a State are enforced in a sister State only by comity.

Contracts made in one State are enforceable in a sister State, not by any compulsion of the United States Constitution, but upon principles of comity. *Bank of Augusta* v. *Earle,* 13 Peters, 519.

Statutes have no operation or effect *per se* except within the territorial limits of the State. *Pennoyer* v. *Neff,* 95 U. S. 714; *Dexter* v. *Edmands,* 89 Fed. 467; *Tennessee Coal Iron & R. R. Co.* v. *George,* 233 U. S.

354; *Hancock National Bank* v. *Ellis*, 172 Mass. 39, 51 N. E. 207.

Transitory causes of action created by the statutes of one State *may*, however, be enforced in another State. *Tennessee Coal Iron & R. R. Co.* v. *George, supra; Dennick* v. *Central R. R. of New Jersey*, 103 U. S. 11; *Loucks* v. *Standard Oil Company of New York*, 224 N. Y. 99, 120 N. E. 198; *Howarth* v. *Angle*, 162 N. Y. 179, 56 N. E. 489. Such enforcement, however, is by the comity of the sister State and not by virtue of the full faith and credit clause of the United States Constitution. See *Loucks* v. *Standard Oil Company of New York, supra*, wherein CARDOZO, C. J., wrote an instructive opinion on this point. See also, *Stewart* v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 445; *Brown* v. *Perry* (Vermont Supreme Court Nov. 5, 1931), 156 Atl. 910; *Texas etc. R. Co.* v. *Cox*, 145 U. S. 593; *Dexter* v. *Edmands, supra; Hancock National Bank* v. *Ellis, supra; State ex rel. Bossung* v. *District Court* (Minnesota Supreme Court, August 2nd, 1918), 168 N. W. 589, 1 A. L. R. 145.

A—Comity will be withheld where such enforcement would violate the public policy of such State.

Under the general rule of comity, New Jersey is not required to enforce contracts made in another State where the enforcement thereof would violate the plain public policy of New Jersey, even if the contracts be valid by the *lex loci contractus*. *Flagg* v. *Baldwin*, 38 N. J. Eq. 219 (Court of Errors and Appeals). The same rule obtains where the cause of action is based directly upon a statute of a sister State.

Under the rule of comity, a State may, and frequently does, enforce actions arising out of the statutes of a

sister State when their enforcement is not inconsistent with its public policy. This is the entire force and extent of the decisions of the various cases cited on pages 39 to 42 of appellant's brief and the other cases cited in said brief wherein the courts *permitted* the enforcement of an assessment against a stockholder of a State banking corporation which was not founded upon an actual judicial proceeding. In the Pennsylvania case of *Broderick* v. *Stephano,* 314 Pa. 408, 171 Atl. 582, it is true that the court mentioned the full faith and credit clause, but this, it is submitted, was unnecessary to the decision, since there was neither a public policy nor a statute of Pennsylvania which would prevent such recovery at law, and the Pennsylvania Banking Act contains provisions similar to those in the New York Act. (See 171 Atl. Rep. at p. 583.) The statement on page 39 of appellant's brief that the same result would have been reached in those cases if the full faith and credit clause compelled the result is no argument that such compulsion exists.

As pointed out in the beginning of this brief, the public policy of the State of New Jersey, by reason of the absence of any provision in that State for double liability of stockholders in banking corporations, and by reason of Section 94b, is against the enforcement of such liability, except in an accounting action in the Court of Chancery of that State. It is submitted, therefore, that, under the doctrine of comity, New Jersey need not enforce the double liability of stockholders of moneyed corporations of other States. *Stewart* v. *Baltimore & Ohio R. R. Co., supra.*

That it does offend the public policy of the State of New Jersey (as evidenced by its refusal to create a similar liability on stockholders in domestic moneyed corporations and by the enactment of the statute involved herein), to enforce liabilities such as the court

is now asked to enforce except by the equitable suit provided for in the statute, requires no argument. See opinion of Justice PARKER, below (R., p. 21). This court said in *Bond* v. *Hume*, 243 U. S. 15 at page 22:

> "And finally, it is certain that, *as it is peculiarly within the province of the law-making power to define the public policy of the state*, where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under a foreign law, comity will yield to the manifestation of the legislative will and enforcement will not be permitted." (Italics ours.)

B—Under the doctrine of comity, a State may constitutionally refuse to enforce a transitory cause of action created by the laws of a sister State.

Had the policy of the State of New Jersey been to prohibit enforcement of such liability in any court and had there been eliminated from Section 94b that portion permitting an equity action, the statute would still be constitutional, for, according to the decisions of this court, a State may constitutionally prohibit any suit in its courts to enforce a cause of action arising under the statutes of a sister State, provided it does not thereby discriminate against citizens of other States. *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, is a leading case on this point. In that case, suit was brought in Ohio on a death action arising under a Pennsylvania statute, the deceased having been a citizen of Pennsylvania. Judgment for the plaintiff in the trial court was reversed by the Ohio Supreme Court because an Ohio statute provided that recovery could be had under a statute of a foreign State creating a cause of action for wrongful death only when the deceased was

a citizen of Ohio. The Supreme Court of the United States affirmed the action of the Ohio Supreme Court. After stating the rule of the privileges and immunities clause, this court said on page 148:

> "But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. * * * But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states."

It was held that the Ohio statute was constitutional, for it did not discriminate between plaintiffs or beneficiaries, but as to the subject matter of the suit. The court said that the plaintiff has "been denied access to the Ohio courts * * * because the cause of action which she presents is not cognizable in those courts."

[The intimation in the appellant's grounds of appeal (No. 2, R., p. 33) that Section 94b violates the privileges and immunities clause (U. S. Constitution, Article IV, Section 2), which point is not argued in appellant's brief, is rebutted by this last-cited case, for it is obvious from the language of the statute in question that the same result obtains thereunder regardless of the citizenship of the person instituting the action or of the citizenship of the creditors of the corporation in question.]

In *Dougherty* v. *McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, a case construing a statute similar to that construed in *Chambers* v. *Baltimore & Ohio R. R. Co.*, *supra*, the Illinois Supreme Court said:

"Whatever force and obligation the laws of one country have in another depend solely on the laws and municipal regulations of the latter. Story on Conflict Laws (8th Ed.), Section 23. * * * Except, however, 'as restrained and limited by that instrument (Constitution), they, (the States) possess and exercise the authority of independent states.' Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. It was not intended by the provisions of the federal constitution relied on by counsel to give to the laws of one state any operation in other states except by a permission, express or implied, by those states. Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357. Laws are without force beyond the jurisdiction of the State which enacts them, and can have no extraterritorial effect except by a comity of other States. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123. * * * If the policy of the forum has been expressed positively in a statute, that policy must prevail. When the Legislature speaks upon a subject upon which it has contitutional power to legislate, public policy is what the statute indicates. * * * Each state, subject to restrictions of the Federal Constitution, determines the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and how far its courts having jurisdiction of the parties shall hear and decide transitory actions where the cause of action has arisen outside of the state. St. Louis, Iron Mountain & S. Railroad Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. ed. 1061. Different states may have different policies, and the same state may have different policies at different times, provided that any policy the state may choose to adopt must operate the same way on its own citizens and those of other states. Chambers v. Baltimore & Ohio Railroad Co., 207 U. S. 142, 28 Sup. Ct. 34, 52 L. ed. 143."

See also, *Spokane & I. E. R. Co.* v. *Whitley*, 237 U. S. 487; *Bradford Electric Light Co.* v. *Clapper*, 286 U. S.

145, especially at page 160; *Home Ins. Co.* v. *Dick,* 281 U. S. 397, especially at page 409, f; and the note in 74 A. L. R. 710, *et seq.*

C—The refusal of New Jersey to extend its comity so as to enforce appellant's alleged cause of action in its Supreme Court does not raise a Federal question, and, therefore, is not reviewable by this court.

Since the cause of action created by the Constitution and Banking Law of New York State can be enforced in other jurisdictions only through the comity of the latter States, it is no concern of this court whether the comity was wisely or unwisely withheld in the present instance. *Finney* v. *Guy,* 189 U. S. 335; *Bond* v. *Hume,* 243 U. S. 15; *Allen* v. *Allegheny Co.,* 196 U. S. 458. The statement made on page 56 of appellant's brief that *Finney* v. *Guy, supra,* was decided solely on the ground that the receiver had no title or right to enforce the assessment in Minnesota under Minnesota law, and hence had no greater rights in other States, is not correct; but the decision was based on another ground, namely, that whether the Wisconsin "court should have permitted this action to be maintained because of the principle of comity between the States, is a question exclusively for the courts of that State to decide."

Hence, it is submitted that the court below was entirely correct in deciding that such causes of action as the appellant presented are enforceable in sister States only through comity (*Finney* v. *Guy,* 189 U. S. 335), and that there is no constitutional inhibition upon the State of New Jersey which would invalidate Section 94b of the New Jersey Corporation Act.

POINT III.

Section 94B of the New Jersey Corporation Act does not violate the due process clause of the Fourteenth Amendment of the United States Constitution.

The appellant argues that the remedy outlined in Section 94b of the New Jersey Corporation Act is so cumbersome and unreasonable as to deprive the appellant of "his property rights" in the assessment alleged to be owing by stockholders resident in New Jersey, without due process of law. This argument is not sound. Certainly, there was no vested right in the special remedial procedure outlined in Section 80 of the New York Banking Law. *Schriver* v. *Woodbine Savings Bank,* 285 U. S. 467, 479; *Howarth* v. *Angle,* 162 N. Y. 179, 188. These cases recognize that where a statute creates a liability of stockholders to assessment, although the liability is transitory, the special statutory forms of remedy provided by such statute may not be resorted to elsewhere. Section 80 of the Banking Law of New York (R., p. 5) is such a special form of remedy upon the obligation created by Section 120 of that Act (R., p. 7) and by the New York Constitution, Article VIII, Section 7 (R., p. 5), inasmuch as Section 80 provides for the method of ascertaining the necessity and amount of said liability, for the accrual of the cause of action in the Superintendent, for the form of action to be either joint or several, for the evidential value of the Superintendent's Certificate, and for the limitation upon the action (R., p. 5). The State of New York, by virtue of the procedural provisions contained in its statutes, cannot interfere with New Jersey's control over its courts. *Tennessee Coal &c. Co.* v. *George,* 233 U. S. 354; *Hancock National Bank* v. *Ellis,* 172 Mass. 39, 51 N. E. 207; *Spokane I. E. R. Co.* v. *Whitley,* 237 U. S. 487 at pages 494, 495. The appellant is met

by this rule if he bases his supposed right to sue at law in New Jersey upon the New York Banking Law, Section 80. The principle declared in the cases of *Schriver* v. *Woodbine Savings Bank, supra,* and *Howarth* v. *Angle, supra,* is persuasive of the contention of these appellees that, in seeking to enforce the stockholders' liability outside of New York, the appellant must *accept* whatever remedies are provided by the forum.

The Legislature has plenary power to provide in what courts and through what procedure a right of action may be enforced in the State of New Jersey. The right to legislate upon the courts within its borders and the remedies afforded therein, inheres in the State of New Jersey as a sovereign, and there is nothing in the United States Constitution which interferes with this complete control. *M'Elmoyle* v. *Cohen,* 13 Peters 312; *Bacon* v. *Howard,* 61 U. S. 22; *Chambers* v. *Baltimore & Ohio RR. Co.,* 207 U. S. 142; *Alabama State Bank* v. *Dalton,* 9 How. 522; *Thorington* v. *Montgomery,* 147 U. S. 490; *Delaware City &c. Co.* v. *Reybold,* 142 U. S. 636. Under this unquestionable power, the New Jersey Legislature provided in Section 94b of the Corporation Act for the equitable accounting proceeding, and the statute is conclusive upon this court. *Bond* v. *Hume,* 243 U. S. 15; *Loeber* v. *Schroeder,* 149 U. S. 580. In the latter case, the court stated at page 585:

> "The said statute relates to a matter of state practice alone, and the proper construction of that statute, upon well settled principles, rested with the state courts. The question as to whether the plaintiff's remedy was in law or in equity was a matter dependent entirely upon local law, and involved no Federal right whatever."

In *Louisville & Nashville R. R. Co.* v. *Schmidt,* 177 U. S. 230, this court held:

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts, or regulate practice therein."

As shown under Points I and II, *supra*, New Jersey may entirely refuse to enforce in its courts the stockholders' liability. Instead of closing our courts completely to suits under statutes to enforce such liability, the State of New Jersey has seen fit to give a remedy of a certain kind. The appellant must be content therewith and cannot complain of any alleged unreasonableness of that remedy provided. It may be remarked that the procedure required by Section 94b is no different from that required in New York prior to the enactment of the present Section 80 of the New York Banking Law (see *Marshall* v. *Sherman*, 148 N. Y. 9, 42 N. E. 419, and *Cheney* v. *Scharmann*, 145 N. Y. App. Div. 456, 129 N. Y. Supp. 993), and it was also considered the reasonable procedure by the New York Supreme Court in *Broderick* v. *Adamson, et al.*, 148 N. Y. Misc. 353, 265 N. Y. Supp. 804 at 819. It is suggested by the decision in the Connecticut case of *Broderick* v. *McGuire, et al.*, 119 Conn. 83, 174 Atl. 314, that in Connecticut, too, an accounting action similar to the New Jersey one would be proper. The New Jersey cases cited by the appellant under Point II of his brief; namely, *McDermott, Receiver* v. *Woodhouse*, 87 N. J. Eq. 615; *Chicago, Title & Trust Co.* v. *Young*, 90 N. J. Eq. 27, and *Graham* v. *Fleissner*, 107 N. J. L. 278, do not suggest the propriety of an action at law, for those cases dealt with the common law liability of subscribers for corporate stock to pay the amount of their subscription and not with the statutory liability of stockholders to assessment to pay corporate debts.

We may, however, discuss the alleged unreasonableness of the remedy provided by the State of New Jersey. In

reply, it is submitted that the difficulties that the appellant envisions are due not to the frailty of the New Jersey statute but rather to the size of the corporation which the appellant has taken over and to its many business ramifications. If the ~~depositors~~ stockholders of the bank numbered but two hundred, and the creditors five hundred, we assume no fault would be found on this score with the statutory provisions. The fortuitous circumstance that in this particular case a giant octopus has expired is no ground for attack upon the statute, nor is any basis afforded in the due process clause for such attack because the appellant, by reason of the factual situation in the case, is obliged to spend much time, effort and money to conduct and conclude successfully the proposed litigation.

POINT IV.

The judgment below was properly entered, and the propriety of such entry is not reviewable by this court.

The motion in this case to strike out the appellant's complaint was for matter of substance and not matter of form. By Rule 40 of the New Jersey Supreme Court (Rule 26 of Practice Act of 1912, P. L. 1912, Chap. 231, p. 389), which reads as follows:

> "Demurrers are abolished. Any pleading may be struck out on motion on the ground that it discloses no cause of action, defense or counterclaim respectively. The order made upon such motion is appealable after final judgment. In lieu of a motion to strike out, the same objection, and any point of law (other than a question of pleading or practice) may be raised in the answering pleadings, and may be disposed of at, or after, the trial; but the court, on motion of either party, may determine the question so raised before trial, and if the decision be decisive

> of the whole case the court may give judgment for the successful party or make such order as may be just,"

the motion to strike the complaint in this case was the equivalent of a general demurrer at common law. Where a demurrer is sustained, and leave is not given to plead over, judgment final for the demurrant should be entered. *Chitty on Pleading,* Vol. 1, 13th American Ed., page 668. That is precisely what took place in this case. Appellant's brief, page 83, erroneously states that the order entering judgment final in favor of the defendant (R., p. 22), was entered "over objections of counsel for plaintiff." This is not so. The order complained of recites that no application was made to amend the said complaint; that is, no leave was asked to plead over (R., p. 22); hence, it is submitted, the entry of final judgment for the demurring defendants was necessary and proper (*United States* v. *The Three Friends,* 166 U. S. 1). Moreover, it was necessary that final judgment be entered to enable the plaintiff to appeal the case for the determination of the questions raised by him under the full faith and credit clause of the United States Constitution. See *United States* v. *The Three Friends, supra.*

Furthermore, it is submitted that under the rule of *Thorington* v. *Montgomery,* 147 U. S. 490, the form of the judgment rendered was purely a matter of practice under the procedure of the State of New Jersey, did not draw in question any right that the appellant had under the Constitution and laws of the United States and raises no Federal question.

POINT V.

The appellant, as Superintendent of Banks of the State of New York, is without right or authority to maintain the alleged cause of action in the State of New Jersey.

It affirmatively appears by the allegations of the complaint in this cause (R., p. 3, *et seq.*), that the appellant, plaintiff below, as Superintendent of Banks of the State of New York, is a mere statutory receiver and that his suit in the New Jersey courts to collect assessments against stockholders, residents of New Jersey, is founded upon the laws of the State of New York, plus his own administrative act in determining that a deficiency of assets exists out of which to satisfy creditors of the Bank of United States, and in making an assessment upon stockholders accordingly.

The courts of the State of New York, interpreting the New York statutes, classify the Superintendent of Banks as a statutory receiver. *Isaac* v. *Marcus,* 258 N. Y. 257, 179 N. E. 487; *Matter of Union Bank,* 204 N. Y. 313, 97 N. E. 737. They also hold that the Superintendent of Banks does not possess the legal title to such assets as are involved in the present suit, but only the right by statute to sue and collect. *LaFayette Trust Co.* v. *Higginbotham,* 136 N. Y. App. Div. 747, 121 N. Y. Supp. 490. It follows from the fact that the appellant, as Superintendent of Banks of the State of New York, was only a statutory receiver, having no legal title to the assets sought to be collected in New Jersey, that he is without standing to come over into the State of New Jersey and prosecute a suit in the latter State. This precise point has been adjudicated by the Supreme Court of the State of Tennessee in *Van Tuyl* v. *Carpenter, et als.;* 135 Tenn. 629, 188 S. W. 234. In that case, Van Tuyl, Superintendent of Banks of the State of New York,

operating under the very laws recited in the appellant's complaint below, sued in Tennessee to enforce his assessments against stockholders. It was held that the Superintendent of Banks of the State of New York had no standing to bring such suits in the courts of Tennessee, and the court wrote a lengthy opinion thereon, in which is included the following language:

> "The right of action, if any, is not in the bank but in the Superintendent of Banks. His right is rooted in the statute but that statute gives him no right to sue in a foreign state. Such vestiture has been held, by the highest authority, an essential prerequisite. Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 388" (other decisions of the United States Supreme Court were also cited). * * *
>
> "However, if the Receiver has the legal title to the claim sued on, he has generally a right to sue in the foreign State (Hardee v. Wilson, 129 Tenn. 511, 167 S. W. 475), but the New York cases hold that the Superintendent of Banks does not possess the legal title to such assets as are here sued on, but only the right to sue and collect. LaFayette Trust Co. v. Higginbotham, 136 App. Div. 747, 121 N. Y. Supp. 490; Matter of Union Bank of Brooklyn, 204 N. Y. 313, 97 N. E. 737. * * *
>
> "We may add that even if it appeared that the foreign Superintendent of Banks, or statutory receiver, had either the title to the assets, or power given him by the statute of his State, to sue in a foreign jurisdiction, or both, we do not see how he could, in a foreign jurisdiction, sue stockholders on their double liability, without a previous judicial ascertainment, in his own State, in a suit brought against the corporation, showing debts and assets and the necessity of a call on stockholders. The possession of title would be of no importance unless the amount due could be ascertained. Likewise, the right to sue in a foreign State could have no extra-territorial effect, save as an incident to a judicial proceeding in the receiver's own State, purporting to confer that right under statutory authority; it

would then be operative, if at all, under the full faith and credit clause of the Federal Constitution."

See also, *Hqle* v. *Allinson*, 188 U. S. 56.

Clark v. *Willard*, 292 U. S. 112, and *Relfe* v. *Rundle* (*Life Association of America* v. *Rundle*), 103 U. S. 222, are distinguishable from the present case, in that, in both of those cases it was found that the liquidator was endowed by the laws and proceedings of the state of the corporate domicile with title to the corporate property, including the proceeds of the assessments against the stockholders, whereas, as above stated, appellant has no title thereto under the New York laws.

Wherefore, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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